In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-390

JUDY CRAFT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (1) that the statute under which they were convicted is unconstitutionally vague, (2) that the prosecutor impermissibly vouched for the credibility of a government witness in his opening statement, and (3) that the trial court erroneously instructed the jury on the burden of proof in a criminal case.

After a jury trial in the United States District Court for the Southern District of Florida, each peti-

tioner was convicted of conspiracy to engage in unlawful interstate prostitution activities, in violation of 18 U.S.C. 371. In addition, petitioners Robert Young, Amos Bridges and Melvina Young were convicted of inducing a woman to engage in interstate prostitution activities, in violation of 18 U.S.C. 2422; and petitioners Robert Young and Bridges were convicted of engaging in interstate prostitution activities, in violation of 18 U.S.C. 1952.[1] Petitioners Robert Young and Bridges were sentenced to consecutive three-year terms of imprisonment for each of their three violations; petitioner Melvina Young received concurrent 90-day sentences for each of her convictions; and petitioners Judy Craft and Colleen Burns were sentenced to 60-day terms for the sole charge on which they were convicted.[2] The court of appeals affirmed as to all petitioners (Pet. App. A).

The evidence adduced at trial demonstrated that petitioners Robert Young, Amos Bridges and Melvina Young operated a prostitution ring out of Miami, Florida. In the course of their conspiracy, they had several of their employees travel to a house of prostitution in Wheeling, West Virginia, known as "Bob-

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[1] Defendant Kathleen Muckenstrum was also convicted of engaging in interstate prostitution activities and conspiracy to do so. She has filed a separate petition for a writ of certiorari, *Muckenstrum* v. *United States*, No. 75-391, August 18, 1975.

[2] Petitioners Young, Craft, and Burns were accorded "split sentence" treatment pursuant to 18 U.S.C. 3651, and substantial portions of their jail terms were suspended; they were also placed on probation for two years.

by's Place." Specifically, Sally Burns testified that, beginning in the late summer of 1971, she became a prostitute working for petitioner Robert Young (Tr. 136-138). Along with petitioner Judy Craft, Burns engaged in prostitution at various Miami hotels, the proceeds of which were subsequently turned over to Robert Young (Tr. 138-140, 141).

At Young's request, Burns traveled to Wheeling, West Virginia, in September, 1971, where Craft and she worked as prostitutes at "Bobby's Place" for approximately three weeks (Tr. 142, 149). At least one-half of Burns' earnings for that period were transferred directly to Robert Young in Miami (Tr. 150-151). Burns continued to work as a prostitute for Young upon returning to Miami (Tr. 153-154) and subsequently returned to Wheeling to work at "Bobby's Place (Tr. 155)."

Patricia Jordan testified that, during the latter part of 1972, petitioner Colleen Burns trained her to work as a prostitute for petitioner Amos Bridges (Tr. 475-476) and that she and Bridges resided in a Miami cottage rented by petitioner Robert Young (Tr. 470-471, 450). At Bridges' behest, Jordan traveled to "Bobby's Place" in Wheeling on two separate occasions for prostitution purposes (Tr. 486, 493). Robert Young telephoned the proprietor of "Bobby's Place" to arrange Jordan's first trip to Wheeling (Tr. 497-498), and Jordan remitted a portion of her West Virginia earnings to Bridges after each trip (Tr. 492, 495-496).

Another prostitute, Dianne Rinaldi, testified that

she had received on-the-job training as a prostitute from petitioner Melvina Young, and that Young had also made the transportation arrangements for her trip to "Bobby's Place" (Tr. 692, 696). Bridges asked that she return to Miami with any money she might earn in West Virginia (Tr. 703). Rinaldi identified codefendant Muckenstrum and petitioner Craft as her fellow workers during her stay at the West Virginia house of prostitution (Tr. 700).

1. Petitioners contend (Pet. 7) that the statute under which they were convicted is unconstitutionally vague. Petitioners argue that Section 61-8-5(b), Ann. West Virginia Code,[3] was incorporated by reference into the Travel Act for purposes of their federal prosecution. The Travel Act generally bars interstate travel for the purpose of carrying on "any unlawful activity," and defines the latter term to include "any * * * prostitution offenses in violation of the laws of the state in which they are committed * * *" (18 U.S.C. 1952). Petitioners urge that since the term "prostitution" has been defined in various ways by the courts and legislatures of the states, and since the term is not otherwise defined in the West Virginia statute and has not been construed by the West Virginia courts, the coverage of the West Virginia prostitution statute is so uncertain as to render it void for vagueness under the Due Process Clause.

Petitioners erroneously construe the interplay be-

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[3] Section 61-8-5(b), 17 Ann. West Virginia Code (1966), prohibits, *inter alia*, "prostitution * * * or procur[ing] another to commit an act of prostitution."

tween the Travel Act and state law. In *United States* v. *Nardello*, 393 U.S. 286, this Court held that under the Travel Act, Congress intended that the enumerated "unlawful activities" should be interpreted generically. *Id.* at 296. In order to sustain a conviction, the particular state statute incorporated under Section 1952 must prohibit the general activity charged, and the precise manner in which that state defines the crime is irrelevant. *Id.* at 295. The West Virginia statute bars "prostitution," and since its particular terminology is not controlling, its failure to define that term does not bar these convictions. *Id.* at 293-294. As the court of appeals properly held (Pet. App. A-3), the trial court's characterization of prostitution as "sexual intercourse for hire" (Tr. 875) unquestionably falls within the generic definition and is therefore sufficient under *Nardello*. Webster's *Third New International Dictionary* 1822 (1961); see also *United States* v. *Chambers*, 382 F. 2d 910 (C.A. 6); *United States* v. *Cozzetti*, 441 F. 2d 344 (C.A. 9). See 6 Michie's *Jurisprudence of Virginia and West Virginia* 249 (1949).

In any event, the West Virginia prostitution statute is not unconstitutionally vague as applied to petitioners' conduct.[4] While their petition cites various

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[4] Since petitioners do not contend that the activities for which they were prosecuted comprehended any element of expression protected by the First Amendment, the higher degree of linguistic precision required to withstand a vagueness challenge in such cases is not applicable here. *Grayned* v. *City of Rockford*, 408 U.S. 104, 109.

authorities applying the term "prostitution" to a wide-range of activities, there can be no question that the term covers "sexual intercourse for hire." Thus, whatever may be the applicability of the West Virginia statute to borderline cases, petitioners were given fair notice that it covered these activities. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108; see *Smith* v. *Goguen*, 415 U.S. 566, 579.

2. Petitioners claim (Pet. 15) that the prosecutor improperly vouched for the credibility of government witness Sally Burns in the following portion of his opening statement to the jury:

> You will hear Sally Burns testify this morning. She will be our first witness. She is going to tell you the truth. She is going to tell you how it all happened [Tr. 115].

The prosecutor's remarks, however, could not reasonably have led the jury to believe that there was other evidence, unknown or unavailable to the jury, on which he relied in his assessment of Burns' credibility. *McMillian* v. *United States*, 363 F. 2d 165, 169 (C.A. 5); see also *Lawn* v. *United States*, 355 U.S. 339, 359, n. 15. His characterization of Burns' testimony was more hortatory than descriptive and in no way implied that he possessed some superior knowledge of Burns' trustworthiness; rather, it suggested that her credibility would be established by her testimony before the jury. See *Gradsky* v. *United States*, 373 F. 2d 706 (C.A. 5). Moreover, the trial judge instructed the jury to disregard the prosecutor's comments. The court of appeals correctly held (Pet. App.

A-3) that this cautionary instruction adequately assured that the jury would evaluate the witness' testimony objectively and that petitioners would not be prejudiced by this comment.

3. Petitioners also challenge (Pet. 12-15) the trial court's instruction to the jury on the burden of proof and the meaning of reasonable doubt. They argue (Pet. 12) that in charging the jury (Tr. 859) that a defendant "may rely upon evidence brought out on examination of witnesses for the Government," the trial court imposed at least a minimum burden of proof on them. The court of appeals properly rejected this contention (Pet. App. A-4), finding that the trial court had emphasized throughout its instructions that the burden of proof rested upon the government, that the burden never shifted to petitioners, and that the law did not require them to prove their innocence or produce any evidence. The charge as a whole made it clear that the burden of proof rested entirely on the government and thus did not constitute error. *Leland* v. *Oregon*, 343 U.S. 790, 795.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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